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ABSTRACT

This legal memorandum provides an overview of the growing body of legislation and litigation concerning reduction in force (RIF). The focus of the article is the suspension or dismissal of teachers for reasons unrelated to their competence or behavior. Cases concerning other professional personnel such as principals, or other staffing strategies such as demotion, are included only as they relate to this primary focus. State statutes constitute the primary source of law relating to RIF. A tabular analysis of the relevant statutory provisions of the 50 states is provided. A majority of states has one or more statutory provisions directly applicable to RIF. These statutory provisions and related case law are discussed in terms of three categories: reasons for RIF, order for release, and order for recall. (Author/MLF)

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REDUCTION-IN-FORCE (RIF)

Spiralling inflation and declining enrollments have combined to create an increasingly important meaning for "RIF" beyond Reading Is Fundamental--namely, Reduction-in-Force.

This Legal Memorandum provides an overview of the growing body of legislation and litigation concerning this latter meaning of RIF. The focus of this article will be the suspension (i.e., layoff, leave, furlough)[1] or dismissal (i.e., nonrenewal or termination)[2] of teachers for reasons unrelated to their competence or behavior. Cases concerning other professional personnel such as principals, or other staffing strategies such as demotion, are included only as they relate to this primary focus.

State statutes constitute the primary source of law relating to RIF. A tabular analysis of the relevant statutory provisions of the 50 states is provided on the next page. As the table indicates, a majority of states (n = 41) has one or more statutory provisions directly applicable to RIF. These statutory provisions and related case law are discussed below in terms of three categories: reasons for RIF, order for release, and order for recall.

Reasons for RIF

Statutory reasons for RIF constitute variations on a theme. The variations of proper reasons for RIF (with the corresponding frequency of statutes) are: decline in enrollment (n = 20); fiscal, economic, or budgetary basis (n = 7); reorganization or consolidation of school districts (n = 6); change in the number of teaching positions (n = 8); curtailment of programs, services, or courses (n = 5); at the discretion of the board (n = 9); or the catch-all category of other "good" or "just" cause (n = 15).

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[1] Kentucky, Pennsylvania, Rhode Island statutes

[2] Alabama, California, Colorado, Connecticut, Delaware, Kansas, Massachusetts, Nevada, and Virginia

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TABULAR OVERVIEW OF STATE STATUTORY PROVISIONS FOR RIF

	Proper Reasons							Order for Release			Order for Restoration		
	Enrollment	Fiscal	Reorganization	Elim. of Position	Elim. of Program	Board Discretion	Other	Nontenured First	Inverse Seniority	Other	Preference List	Inverse Seniority	Other
Ala.						x							
Alaska	x												
Ariz.	x	x										x	
Ark.							x						
Calif.	x	x							x				
Colo.				x			x	x					
Conn.				x			x						
Del.	x				x								
Fla.													
Ga.	x				x								
Hawaii	x						x	x			x	x	
Idaho						x							
Ill.						x		x					
Ind.						x							
Iowa													
Kans.													
Ky.	x		x			x			x			x	
La.						x				x			
Maine						x							
Md.													
Mass.							x						
Mich.							x						x
Minn.	x			x					x				x
Miss.													
Mo.	x	x		x				x	x			x	
Mont.						x							
Nebr.					x		x						
Nev.	x		x										
N.H.													
N.J.	x	x	x				x		x				
N.Mex.							x		x				
N.Y.	x	x		x					x		x	x	
N.C.	x		x	x							x		
N. Dak.						x							
Ohio							x						
Okla.													
Oreg.	x	x			x					x			
Pa.	x		x		x				x			x	
R.I.	x								x			x	
S.C.													
S.Dak.													
Tenn.	x						x				x		
Texas				x					x				
Utah	x	x	x		x								
Vt.							x						
Va.							x						
Wash.							x						
W.Va.						x					x	x	
Wis.	x								x			x	
Wyo.	x						x						
Totals	20	7	6	8	5	9	15	4	11	2	5	9	2

Enrollment decline. In states where enrollment decline is specified as an appropriate reason for RIF, courts have generally deferred to the good faith determinations of school district officials. In a few Pennsylvania cases, the courts have scrutinized specific numbers to determine whether the board had presented sufficient evidence of a substantial decline in enrollment. For example, in *Phillippi v. School Dist.*, 367 A.2d 1133 (Pa. Commw., 1977), a reduction in total enrollment from 1,976 to 1,439 (27%) over a six-year period was held to be substantial.

Other courts have been more demonstrably deferential to the District's judgment, requiring less specific evidence. For example, in a Michigan suit, the superintendent had determined that, based on a projection of student enrollment decline, the services of 43.4 teachers would not be needed. His projection was derived from "the present student enrollment, along with contemplated moves out of the district, by discussions between teachers and students...by checking with local parochial schools...and by the school census from previous years...." The court upheld his judgment. *East Detroit Fed'n of Teachers v. Board of Educ.*, 233 N.W.2d 9 (Mich. 1974). The prevailing sentiment of such cases was expressed early in *Woods v. Board of Educ.*, 67 So.2d 840, 841 (Ala. 1953) as follows:

> Of necessity much must be left to the enlightened discretion of the board and its superintendent of education and after canvassing the situation with which they were confronted and having fairly determined that it was necessary to undertake the reduction in teacher personnel on the basis of the reduction in student attendance, it was proper to so order it.

Fiscal, economic, or budgetary basis. A Pennsylvania decision reveals the importance of following statutorily specified reasons. The Commonwealth Court reinstated a teacher with back pay because, although he had been suspended on provable budgetary grounds, Pennsylvania's statute does not expressly enumerate this reason. *Theros v. Warwick Board of School Directors*, 401 A.2d 575 (Pa. Commw. 1979).

In states where fiscal reasons for RIF are specifically permissible, the limits of the statutory language must be determined. For example, a California appellate court held that "lack of funds," as specified in the state statute, did not require a showing of bankruptcy. *California School Employees Ass'n v. Pasadena Unified School Dist.*, 133 Cal. Rptr. 633 (Ct. App. 1977).

School district reorganization or consolidation. A change in school district organization as the basis for RIF has also posed problems in statutory interpretation. For example in *Hensley v. State Bd. of Educ.*, 376 P.2d 968 (N.M. 1962), the Supreme Court of New Mexico held that a teacher carries his tenure status from the constituent school district into the consolidated district, thus retaining priority in RIF situations. In *Beckett v. Roderick*, 251 A.2d 427 (Me. 1969), the Supreme Court of Maine reached an opposite result based on that state's statutes.

Elimination of position. Several lawsuits have been brought by RIFfed administrators who claimed that their positions had not been actually eliminated but instead merely fractionalized. The determinative issue seems to have been whether or not the fractionalization resulted in actual absorption at least on a partial basis and thus a net saving. For example, in *Beers v. Nyquist*, 338 N.Y.S. 2d 745 (Sup. Ct. 1972), a New York appellate court upheld the elimination of a director of guidance's position where his duties were reassigned to the high school principal and six existing teacher-counselors. Teacher fractionalization cases have not been as frequent but add the issue of certification. For instance, in an early New Jersey case, the state supreme court upheld the Riffing of a physical education teacher whose duties were reassigned five-eights to a new teacher and three-eights to existing staff. The new teacher was assigned to teach English on a three-eights basis. The new teacher was certified to teach both P.E. and English, whereas the RIFfed teacher only had certification in P.E. *Weider v. Board of Educ.*, 170 A. 631 (N.J. 1934). Courts have also tended to defer to board discretion with respect to the educational value of eliminated positions, e.g. *Yaffee v. Board of Educ.*, 380 A.2d 1 (Conn. Super. 1977).

Program curtailment. Some statutes which allow for RIF based on curtailment of programs require prior approval by the state education department. The importance in such states of being able to prove that official prior approval had been obtained is illustrated in two Pennsylvania cases, one of which resulted in a decision favoring the board, *Gabriel v. Trinity Area School Dist.*, 350 A.2d 203 (Pa. Commw. 1976), and the other in a loss for the board *Eastern York Dist. v. Long*, 407 A.2d 69 (Pa. Commw. 1979).

Other good or just cause. The catchall language of other "good" or "just" cause has been interpreted to include such traditional RIF reasons as fiscal exigency. E.g., *Nutter v. School Comm.*, 359 N.E.2d 962 (Mass. App. 1979); *School Comm. v. Koski*, 391 N.E.2d 708 (Mass. App. 1979); cf. *Briggs v. Board of Directors*, 282 N.W. 2d 740 (Iowa 1979).

Rights of Employees Under RIF

The order of suspension or dismissal is statutorily specified in 16 states. Some statutes (n = 4) specify that nontenured employees are to be RIFed before tenured employees. As an alternative or an addition, some statutes (n = 11) state that suspension or dismissal must be accomplished in inverse order, i.e., based on strict seniority. The Louisiana statute, however, specifically states that seniority is irrelevant. Oregon's statute does not specifically provide for an order for layoff, but has a seniority-merit formula for the transfer of employees scheduled for layoff.

Tenured over nontenured. On the matter of the order for release, based on valid reasons, between tenured and nontenured teachers, the overwhelming majority of the decisions have granted tenured teachers a priority, e.g., *Pickens v. County Bd. of Educ v. Keasler*, 82 So.2d 197 (Ala. 1955); *Board of School Trustees v. O'Brien*, 190 A.2d 23 (Del. 1963); *State ex rel. Marolt v. Independent School Dist.*, 217 N.W. 2d 212 (Minn. 1974); *Witt v. School*

Dist. No. 20, 273 N.W.2d 669 (Neb. 1978); *Seidel v. Board of Educ.*, 164 A 900 (N.J. 1933); *Swisher v. Darden*, 287 P.2d 73 (N.M. 1955). However, a small majority of courts have rejected this "bumping" right. *Fuller v. Berkeley School Dist.*, 40 P.2d 831 (Del. 1934); *Garovoy v. Board of Educ.*, 41 Conn. L.J. 8 (August 14, 1979). Nor do such decisions necessarily end the matter, for in Connecticut the legislature subsequently reversed *Garovoy* by amending the statute to provide an express priority for tenured teachers in such situations. Even in absence of statutory requirement most districts will RIF provisional teachers first.

Seniority. Where statutes (and contracts) are silent about the proper basis for retention among tenured or nontenured teachers, courts have tended to leave the matter to the board's discretion, and again most boards have elected to use seniority as at least one factor. *Williams v. Board of Educ.*, 82 So.2d 549 (Ala. 1955); *Hill v. Dayton School Dist.*532 P.2d 1154 (Wash. 1975); *Peters v. Kitsap*, 509 P.2d 67 (Wash. App. 1973). In states where legislatures have mandated seniority as a criterion, courts have been fully supportive, e.g., *Silver v. Board of Educ.*, 302 N.Y.S.2d 638 (App. Div. 1975); *Lezette v. Board of Educ.*, 319 N.E. 2d 189 (N.Y. 1974); *Welsko v. Foster Township School Dist.*, 119 A.2d 43 (Pa. 1956); focusing their attention on subsidiary matters such as the applicability and calculation of seniority credit, e.g., *Ellerbrook v. Board of Educ.*, 269 N.W. 2d 858 (Minn. 1978); *Moritz v. Board of Educ.*, 400 N.Y.S.2d 249 (App. Div. 1977).

Merit. Merit is not statutorily mandated as the criterion for RIF in any state. Pennsylvania had utilized merit in combination with seniority until 1979, which generated considerable litigation about merit ratings, e.g., *Smith v. Richland School Dist.*, 387 A.2d 974 (Pa. Commw. 1978); *New Castle Area School Dist. v. Bair*, 368 A.2d 345 (Pa. Commw. 1977).

Order of Recall

Some of the statutes (N = 13) establish an order of recall for teachers suspended for RIF reasons. Five states have mandated that laid off teachers must have their names placed on a "preference list" for subsequent vacancies. In addition or alternatively, nine states indicate that restoration should be in inverse order, i.e., on the basis of seniority. Michigan and Minnesota have neither a requirement for a preference list nor one for inverse order, but do provide that the teacher be reinstated for the first vacancy for which he or she is qualified. Recall provisions, like release provisions, sometimes contain a condition that the teacher be qualified.

In contrast to the order of release, the order of recall has generated limited litigation thus far. In the absence of express statutory direction, Illinois' intermediate-level appellate courts have imported a legislative intent that tenured teachers be given preferential recall rights, *Bilek v. Board of Educ.*, 377 N.E.2d 1259 (Ill. App. 1978), and that nontenured RIFed teachers not be accorded any preference in rehiring, i.e., that they stand on the same footing as any other applicant. *Huetteman v. Board of Educ.*, 372 N.E.2d 716 (Ill. App. 1978).

Related State Statutory Issues

Related issues which are not addressed in the table but which are based primarily on state statutes are: 1) whether the board's duty in following the order for release or recall extends to realignment or rescheduling; 2) whether bumping or recall rights are limited to positions for which the teacher is legally qualified; and 3) what procedural due process protections are accorded to teachers targeted for RIF.

Realignment or rescheduling. A few courts have declared that the duty of school boards in RIF situations extends to the realignment or rescheduling of teaching staff in order to retain teachers with seniority rights who otherwise would be laid off. *Amos v. Board of Educ.*, 388 N.Y.S.2d 435 (App. Div. 1976); *Welsko v. School Board*, 119 A.2d 43 (Pa. 1956). Even in such jurisdictions, this duty has limits. For example, in *Chambers v. Board of Educ.*, 418 N.Y.S.2d 291 (N.Y. 1979), New York's highest court rejected the plaintiff-teacher's argument that the board's rescheduling duty extended to allowing him to teach in an area outside of his certification.

Legally qualified. In most jurisdictions, by state statute or case law, bumping and recall rights carry a prerequisite that the teacher be legally qualified for the position in question. "Legally qualified" in such situations means, at a minimum, certified for the other position. This additional certificate must be current at the time of the board's RIF decision. *Hagopian v. Board of Educ.*, 372 N.E.2d 990 (Ill. App. 1978); *Penzenstadler v. Avonworth School Dist.*, 403 A.2d 621 (Pa. Commw. 1979). Higher standards for legal qualification may be established at the state or local level, e.g., *Lenard v. Board of Educ.*, 384 N.E.2d 1321 (Ill. 1979); *McLain v. Board of Educ.*, 384 N.E.2d 540 (Ill. App. 1978). "Tenure area" jurisdictions, such as New York, present special complications. For example, in *Waiters v. Board of Educ.*, 387 N.E.2d 615 (N.Y. 1979) and *Neer v. Board of Educ.*, 402 N.Y.S.2d 629 (App. Div. 1978), prior practice was found to be the way to determining whether remedial reading extended within or across the elementary and secondary grade levels.

Procedural due process. Most states statutorily provide for some form of procedural due process for educational personnel who are to be suspended or dismissed on account of RIF. These procedural protections are typically more rigorous for the dismissal situation because a greater interest is at stake. In either event, there is a judicial trend toward requiring written notice of the reason(s) for RIF, e.g, *Lovelace v. Ingram*, 518 P.2d 1102 (Okla. 1974); *Durfey v. Board of Educ.*, 604 P.2d 480 (Utah 1979); *Hill v. Dayton School Dist.*, 532 P.2d 1154 (Wash. 1975); a board hearing prior to suspension or dismissal, *Howell v. Woodlin School Dist.* 596 P.2d 56 (Colo. 1979); *Kodish v. Spring-Ford Area School Dist.*, 373 A.2d 124 (Pa. Commw. 1977); and the right to appeal the board's decision, *Goodwin v. Board of Educ.*, 267 N.W.2d 142 (Mich. App. 1978).

Federal Issues

The procedural due process section above illustrates the interplay of state statutory and federal constitutional rights. For example, in *Howell v. Woodlin*

School Dist. (supra), Colorado's supreme court held that, despite the absence of applicable statutory due process provisions, RIFed teachers have a constitutionally protected interest in continued employment and thus a right to a pretermination hearing. The federal Circuit Court of Appeals came to the same conclusion in *Unified School Dist. v. Epperson*, 583 P.2d 1118 (10th Cir. 1978). Similarly, boards may not terminate teachers for constitutionally impermissible motives under the pretext of RIF reasons. For example, another federal Court of Appeals held that a terminated teacher had been dismissed because of her exercise of First Amendment rights rather than for bona fide RIF reasons. *Zoll v. Eastern Allamahee Community School Dist.*, 588 F.2d 246 (8th Cir. 1978).

Federal constitutional requirements and related civil rights statutes similarly serve as barriers against RIFing for racially discriminatory reasons. A line of Fifth Circuit cases starting with *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1970), cert. denied, 396 U.S. 1032 (1970), established the standard that staff reductions in school districts undergoing court-ordered desegregation must be based on objective, nonracial criteria, e.g., *Moore v. Tangipahola Parish School Bd.*, 594 F.2d 489 (5th Cir. 1979). Conversely, a successful RIF claim of reverse discrimination was brought in *Bacica v. Board of Educ.*, 451 F.Supp. 882 (W.D. Pa. 1978).

Local Issues

To the extent that they do not conflict with state statutes and constitutional rights, local policies and contracts can dictate the reasons and the procedures for RIF. For example, courts have upheld RIF reasons which were provided in a teacher's individual contract beyond those specified in the state statute, e.g., *Ashby v. School Township*, 98 N.W.2d 848 (Iowa 1959). Such reasons or other RIF matters may be enforceably specified in a collective bargaining agreement only where RIF is a negotiable topic. Courts have not agreed on the negotiability of RIF, compare *Barrington School Comm. v. Rhode Island*, 388 A.2d 1369 (R.I. 1978) (negotiable) with *Maywood Board of Educ. v. Maywood Educ. Ass'n*, 401 A.2d 711 (N.J. App. 1979) (non-negotiable), nor on its arbitrability, compare *Rylke v. Portage Area School Dist.* 375 A. 2d 692 (Pa. 1977) (arbitrable) with *Lockport Area Special Education Cooperative v. Education Ass'n*, 338 N.E.2d 463 (Ill. 1975) (non-arbitrable).

Some Conclusions

Obviously, the variety of applicable state statutes makes generalizations about RIF difficult. Nevertheless, a few important principles seem to emerge from the cases.

1. Where recognized as a legitimate action by school districts, RIF operates as an exception to tenure laws which preclude termination of educators in absence of personal cause.

2. Because RIF is treated as an exception to the usual tenure laws, the courts will expect the district invoking such actions to make at least some kind of case justifying the action under the statute. Failure to do so will be regarded as an attempt to use RIF as a subterfuge for evading tenure provisions.

3. RIF is not so apt to be treated as an exception to constitutional protection, particularly the substantive protections: right to free speech and association, freedom from discrimination on the basis of race or religion, and the like. To a lesser extent, even procedural due process protection may be required for employees being RIFed.

4. Even in absence of specific statutory direction RIF procedures will be required to be rational and consistent, both in design and application. Failure to meet the standard may result in a finding by a court of arbitrary and capricious action which a court cannot sustain.

This Legal Memorandum was contributed by Perry A. Zirkel, dean and professor of the School of Education at Lehigh University, Bethlehem, Pa., and Charles T. Bargerstock, member of the Pennsylvania Bar, and doctoral candidate, Lehigh University.

For more information on RIF, see NASSP monograph Reduction-in-Force, Working Policies and Procedures. (1978).

The Law on Reduction-in-Force: A Summary of Legislation and Litigation, Educational Research Service, Inc. (1980).

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